

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
International Settlements Policy Reform)	IB Docket No. 11-80
)	
Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon)	RM-11322
)	
IConnect Wholesale, Inc. d/b/a TeleCuba; Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba)	IB Docket No. 10-95
)	
Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct)	IB Docket No. 05-254
)	

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 10, 2016

Released: February 12, 2016

Comment Date: (30 days after publication in the Federal Register)

Reply Comment Date: (45 days after publication in the Federal Register)

By the Commission: Commissioner Pai issuing a statement; Commissioner O'Rielly concurring and issuing a statement.

I. INTRODUCTION

1. In this Further Notice of Proposed Rulemaking (Further Notice) in the above captioned proceedings, we propose to remove the nondiscrimination requirements from the U.S.-Cuba route. Recent policy guidance from the U.S. Department of State (State Department) recommends that the Commission discontinue application of the nondiscrimination requirements on the U.S.-Cuba route in light of the changes in U.S.-Cuba relations.¹ Currently, under Commission policy and rules, the terms and conditions of any operating agreement to provide facilities-based switched voice service on the U.S.-Cuba route between a U.S. carrier and a carrier with market power in Cuba must be identical to the equivalent terms and conditions in the agreement of any other U.S. carrier providing the same or similar service between the United States and Cuba.² In this Further Notice, we seek comment on the State

¹ On November 9, 2015, the International Bureau issued a Public Notice stating that it had received a letter from the State Department detailing new policy guidance on the licensing of telecommunications services between the United States and Cuba. *Modification of Process Regarding the Licensing of Telecommunications Services Between the United States and Cuba*, Public Notice, 30 FCC Rcd 12458 (IB 2015) (*2015 Cuba Public Notice*), attaching Letter from Ambassador Daniel A. Sepulveda, U.S. Coordinator for International Communications and Information Policy, U.S. Department of State, to Thomas Wheeler, Chairman, FCC (filed Oct. 26, 2015).

² 47 CFR § 63.22(f). See *International Settlement Policy Reform et al.*, Report and Order, 27 FCC Rcd 15521, 15530-32, paras. 17-20 (2012) (*2012 ISP Reform Order*).

Department's recommendation for removal of the nondiscrimination requirements based on the changes in U.S.-Cuba relations and whether such a Commission action would serve the public interest.

II. BACKGROUND

2. The Commission has licensed and regulated telecommunications services between the United States and Cuba in conformance with guidance from the State Department, first received in 1993 and periodically updated since then.³ Pursuant to this guidance, the Commission has imposed nondiscrimination requirements on the provision of facilities-based telecommunications services between the United States and Cuba. These nondiscrimination requirements on the U.S.-Cuba route are comprised of (1) the nondiscrimination prong of the International Settlements Policy (ISP),⁴ as codified in Section 63.22(f) of the Commission's rules,⁵ and (2) the nondiscrimination requirement condition placed on the waiver of benchmark settlements by the *TeleCuba Waiver Order*.⁶

3. As part of its 2010 guidance, the State Department requested that the Commission not only continue to apply the ISP, but also continue to apply its benchmarks settlement rate policy to the U.S.-Cuba route.⁷ The State Department stated, however, that the Commission should consider granting waivers of the benchmarks settlement policy, as well as of the ISP, to enable carriers to provide communications services between the United States and Cuba.⁸ In 2011, the International Bureau granted a waiver of the benchmarks settlement policy to allow U.S. carriers to pay the Cuban carrier, Empresa de Telecomunicaciones de Cuba S.A. (ETECSA), above benchmark settlement rates to terminate traffic in

³ See *FCC to Accept Applications for Service to Cuba*, Public Notice, Report No. I-6831 (IB July 27, 1993), attaching Letter from Richard C. Beard, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State, to James H. Quello, Chairman, FCC (filed July 22, 1993); *Modification of Process to Accept Applications for Service to Cuba and Related Matters*, 25 FCC Rcd 436 (IB 2010) (*2010 Cuba Public Notice*), attaching Letter from Ambassador Philip L. Verveer, U.S. Coordinator for International Communications and Information Policy, U.S. Department of State, to Julius Genachowski, Chairman, FCC (filed Jan. 12, 2010); *2015 Cuba Public Notice*.

⁴ The Commission established the ISP to prevent foreign carriers with market power from discriminating against or using threats of discrimination or other anticompetitive actions against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic. See *2012 ISP Reform Order*, 27 FCC Rcd at 15522-23, para. 2. The ISP governed how U.S. carriers negotiated with foreign carriers for the exchange of international traffic on certain international routes. The ISP required that: (1) all U.S. carriers must be offered the same effective accounting rate and same effective date for the rate ("nondiscrimination"); (2) all U.S. carriers are entitled to a proportionate share of U.S.-inbound, or return traffic based upon their proportion of U.S.-outbound traffic ("proportionate return"); and (3) the accounting rate is divided evenly between U.S. and foreign carriers for U.S.-inbound and -outbound traffic so that inbound and outbound settlement rates are identical ("symmetrical settlement rates"). See *id.*

⁵ 47 CFR § 63.22(f).

⁶ *ICconnect Wholesale, Inc., d/b/a TeleCuba; Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba*, Memorandum Opinion and Order, 26 FCC Rcd 5217, 5228, para. 31 (IB 2011) (*TeleCuba Waiver Order*). This waiver applies to any U.S. carrier seeking to provide direct services between the United States and Cuba, provided that the carrier first notifies the Commission that it agrees to accept the terms and conditions of the *TeleCuba Waiver Order*. See *id.* at 5229, para. 33.

⁷ *2010 Cuba Public Notice*, 25 FCC Rcd at 439 (citing *International Settlement Rates et al.*, Report and Order, 12 FCC Rcd 19806 (1997) (*Benchmarks Order*)). The Commission promotes lower international settlement rates through its benchmarks policy that governs the international settlement rates that U.S. carriers may pay to foreign carriers to terminate international traffic from the United States. See *2012 ISP Reform Order*, 27 FCC Rcd at 15523-24, paras. 3-4.

⁸ *2010 Cuba Public Notice*, 25 FCC Rcd at 439.

Cuba for the purpose of reestablishing direct telecommunications services with Cuba.⁹ One of the conditions of the waiver is that the terms and conditions of an agreement with the Cuban carrier may not be exclusive and other U.S. carriers must be able to enter into an agreement with ETECSA on the same terms and conditions.¹⁰

4. In the *2012 ISP Reform Order*, the Commission found that, given the significant competitive growth in U.S.-international calling markets, the ISP no longer promoted and protected competition but hurt U.S. carriers' ability to negotiate competitive rates with foreign carriers.¹¹ The Commission removed the ISP from all routes, except that it retained the nondiscrimination prong of the ISP on the U.S.-Cuba route.¹² The Commission noted that telecommunications services between the United States and Cuba had been subject to historically unique circumstances, and that there was no direct telephone service between the United States and Cuba.¹³ Although the Commission had proposed to retain all prongs of the ISP on the U.S.-Cuba route,¹⁴ commenters argued that only the nondiscrimination prong should be retained.¹⁵ AT&T, for example, argued that retention of the proportionate return and symmetrical settlement rates prongs of the ISP on the U.S.-Cuba route would not promote the resumption of direct telephone service between the United States and Cuba.¹⁶ The State Department agreed with commenters supporting retention of the nondiscrimination prong of the ISP.¹⁷ The Commission found the commenters persuasive, and decided to retain and codify just the nondiscrimination prong of the ISP on the U.S.-Cuba route consistent with the guidance from the State Department.¹⁸

5. On December 17, 2014, the President announced that the United States would take historic steps to chart a new course in relations with Cuba to create more opportunities for the American and Cuban people.¹⁹ Subsequent to that announcement, two U.S. carriers – IDT Domestic Telecom, Inc. and Sprint Corporation – were able to negotiate operating agreements with ETECSA for the purpose of reestablishing direct telecommunications services with Cuba. Because the agreements call for the U.S. carrier to pay ETECSA an above benchmark rate to terminate traffic in Cuba, both carriers agreed to the conditions set out in the *TeleCuba Waiver Order*, including the nondiscrimination requirement.²⁰ The

⁹ *TeleCuba Waiver Order*, 26 FCC Rcd at 5217, para. 1 (allowing TeleCuba to pay ETECSA up to \$0.84 per minute to terminate U.S. traffic in Cuba). To date, TeleCuba has not filed an agreement with ETECSA.

¹⁰ *Id.* at 5228, para. 31.

¹¹ *See 2012 ISP Reform Order*, 27 FCC Rcd at 15530, para. 16.

¹² *Id.* at 15530-32, paras. 17-20.

¹³ *Id.* at 15530, para. 17. At that time all telephone traffic between the United States and Cuba was routed through other countries and no U.S. carrier had an agreement to terminate traffic with a Cuban carrier.

¹⁴ *Id.* at 15528, para. 13 (citing *International Settlements Policy Reform*, Notice of Proposed Rulemaking, 26 FCC Rcd 7233, 7241-42, paras. 13-16 (2011)).

¹⁵ *Id.* at 15529, para. 15.

¹⁶ *Id.*

¹⁷ *Id.* (“The State Department ‘supports continued application of the nondiscrimination requirement so that all U.S. carriers are able to negotiate the same effective accounting rates with the same effective dates when direct traffic on the U.S.-Cuba route recommences.’”) (citing Letter from Ambassador Philip Verveer, U.S. Coordinator for International Communications and Information Policy, U.S. Department of State, to Julius Genachowski, Chairman, FCC (filed Oct. 26, 2012)).

¹⁸ *Id.* at 15530, para. 17. The nondiscrimination requirement is codified at 47 CFR § 63.22(f).

¹⁹ *See 2015 Cuba Public Notice*, 30 FCC Rcd at 12458.

²⁰ *See* Letter from Douglas W. Everette, Counsel, IDT Domestic Telecom, Inc., to Mindel De La Torre, Chief, International Bureau, FCC, IB Docket No. 10-95 (filed Feb. 12, 2015) (stating notification of acceptance of terms and conditions for waiver of the benchmark rate for Cuba); Letter from Douglas W. Everette, Counsel, IDT Domestic Telecom, Inc., to Mindel De La Torre, Chief, International Bureau, FCC, IB Docket No. 10-95 (filed Feb.

(continued....)

carriers filed their agreements in the public record, as required by the *TeleCuba Waiver Order* and the *2012 ISP Reform Order*.²¹

III. DISCUSSION

6. The State Department recently updated its guidance regarding the provision of communications services between the United States and Cuba and now recommends that the Commission discontinue application of the nondiscrimination requirements on the U.S.-Cuba route in light of the changes in U.S.-Cuba relations.²² We agree that these changed circumstances raise questions about the continued need to apply the nondiscrimination requirements. Therefore, we seek comment on removing (1) the nondiscrimination prong of the ISP, as codified in Section 63.22(f) of the Commission's rules, and (2) the nondiscrimination requirement condition placed on the waiver of benchmark settlements by the *TeleCuba Waiver Order*.

7. We seek comment on whether removal of these nondiscrimination requirements would serve the public interest, for example, by leading to more direct agreements between U.S. carriers and ETECSA. In the *2012 ISP Reform Order*, the Commission found that removal of the ISP on all routes (except the nondiscrimination prong on the U.S.-Cuba route) would provide U.S. carriers greater flexibility to negotiate lower settlement rates. Do commenters agree that circumstances have now changed sufficiently with respect to Cuba to anticipate that the removal of the nondiscrimination prong of the ISP on the U.S.-Cuba route will provide similar opportunities? More generally, we seek comment on whether removal of these nondiscrimination requirements may encourage competition on the U.S.-Cuba route.²³ Would the ability of U.S. carriers to negotiate individualized operating agreements with ETECSA give U.S. carriers the ability to negotiate lower rates? Are there any concerns that removal of our nondiscrimination requirements would cause discrimination or threats of discrimination or other anticompetitive actions against U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of traffic between the United States and Cuba?

8. We observe that the operation of the current benchmark settlement rate for telecommunications services between the United States and Cuba – which we are not proposing to change – will continue to provide a safeguard against anticompetitive actions against U.S. carriers.²⁴ Although

(Continued from previous page) _____
13, 2015) (adding certification); Letter from Maria Cattafesta, Senior Counsel, Government Affairs, Sprint Corporation, to Mindel De La Torre, Chief, International Bureau, FCC, IB Docket No. 10-95 (filed Aug. 7, 2015) (stating notification of acceptance of terms and conditions for waiver of the benchmark rate for Cuba).

²¹ Letter from Douglas W. Everette, Counsel, IDT Domestic Telecom, Inc., to Mindel De La Torre, Chief, International Bureau, FCC, IB Docket No. 10-95 (filed Feb. 19, 2015) (stating request for review of service agreement); Letter from Douglas W. Everette, Counsel, IDT Domestic Telecom, Inc., to Mindel De La Torre, Chief, International Bureau, FCC, IB Docket No. 10-95 (filed Feb. 24, 2015) (adding unredacted version of Annex A of the Service Agreement); Letter from Maria Cattafesta, Senior Counsel, Government Affairs, Sprint Corporation, to Mindel De La Torre, Chief, International Bureau, FCC, IB Docket No. 10-95 (filed Sept. 10, 2015) (stating request for review of service agreement).

²² *2015 Cuba Public Notice*, 30 FCC Rcd at 12460-61.

²³ In a related proceeding, the International Bureau removed Cuba from the Commission's "Exclusion List for International Section 214 Authorizations." *Removing Cuba from the Exclusion List for International Section 214 Authorizations*, IB Docket No. 15-289, Order, DA 16-55 (IB Jan. 15, 2016). In that proceeding, AT&T Services, Inc. (AT&T) recommended that the Commission take steps to encourage "competition by removing the non-discrimination requirements (including Section 63.22(f) of the Commission's rules) that apply to the U.S.-Cuba route, the last U.S. international route subject to such regulation." AT&T Comments, IB Docket No. 15-289, at 1 (Dec. 4, 2015). Although AT&T's recommendation regarding the ISP and Section 63.22(f) is beyond the scope of the International Bureau's Exclusion List proceeding, this Further Notice is consistent with that recommendation.

²⁴ The State Department recommends that we continue to apply the benchmarks settlement policy on the U.S.-Cuba route, but continue to allow waivers of limited duration. See *2015 Cuba Public Notice*, 30 FCC Rcd at 12461.

carriers may still obtain operating agreements above the benchmark rate, such agreements would require Commission grant of a waiver of the benchmark rate before they could go into effect, and, in considering the waiver, the Commission would have the opportunity to assess on a case-by-case basis whether allowing an above benchmark settlement rate without the protections of a nondiscrimination rule (with or without conditions) would serve the public interest. We seek comment on these observations.

9. Currently, any agreement with ETECSA is routinely made available for public inspection under the nondiscrimination requirement condition placed on the waiver of the benchmark settlements in the *TeleCuba Waiver Order*.²⁵ We seek comment on whether, if we are to remove the nondiscrimination requirement in the *TeleCuba Waiver Order*, we also should no longer consider operating agreements between a U.S. carrier and ETECSA to be routinely available for public inspection.²⁶ In that waiver order, we adopted other conditions that we believed would help “balance the policy goals of reestablishing direct telecommunications links with Cuba by U.S. carriers with promoting competition and lower international calling rates for services to Cuba, as well as other international routes.”²⁷ Commenters may address whether it would serve the public interest to reevaluate other conditions adopted in the *TeleCuba Waiver Order* in light of our proposed changes.²⁸ Finally, we seek comment on whether there are other actions we should take involving the U.S.-Cuba route to facilitate the provision of service between the United States and Cuba.

IV. PROCEDURAL MATTERS

10. ***Ex Parte Rules – Permit-But-Disclose.*** The proceeding this Further Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²⁹ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b).³⁰ In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in

²⁵ See *TeleCuba Waiver Order*, 26 FCC Rcd at 5228, para. 31. See also *2012 ISP Reform Order*, 27 FCC Rcd at 15532, para. 21 (any agreement with ETECSA needs to be consistent with the nondiscrimination requirement in 47 CFR § 63.22(f) and such agreements will be routinely available for public inspection).

²⁶ Under Commission rule, the “rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S.-international traffic” are not routinely available except as otherwise specified. 47 CFR § 0.457(d)(1)(v) (citing, e.g., *2012 ISP Reform Order*, as an exception to the general rule, agreements on the U.S.-Cuba route are routinely made available for public inspection).

²⁷ See *TeleCuba Waiver Order*, 26 FCC Rcd at 5222, para. 15.

²⁸ See *id.* at 5228-29, para. 31 (“Conditions”).

²⁹ 47 CFR §§ 1.1200 *et seq.*

³⁰ *Id.* § 1.1206(b).

their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

11. **Comment Filing Procedures.** Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this Further Notice. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
 - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
 - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

12. **People with Disabilities.** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

13. **Initial Paperwork Reduction Act of 1995 Analysis.** The Further Notice does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.³¹

14. **Initial Regulatory Flexibility Certification.** The Regulatory Flexibility Act of 1980, as amended (RFA),³² requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."³³ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³⁴ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.³⁵ A "small business concern" is one

³¹ Pub. L. No. 107-198, 116 Stat. 729 (2002); see 44 U.S.C. 3506(c)(4).

³² See 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847, 857 (1996).

³³ 5 U.S.C. § 605(b).

³⁴ 5 U.S.C. § 601(6).

³⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity

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which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

15. The Commission has licensed facilities-based telecommunications between the United States and Cuba based on policy guidance from the State due to the unique relationship between the United States and Cuba. The State Department has recently provided new guidance that recommends that the Commission remove the nondiscrimination requirements placed on the U.S.-Cuba route.

16. In this Further Notice, the Commission seeks comment on proposals to remove the nondiscrimination requirements for the provision of telecommunications services between the United States and Cuba. We seek comment on whether, if we are to remove the nondiscrimination requirements, we also should no longer consider operating agreements between a U.S. carrier and ETECSA to be routinely available for public inspection. The proposals in this Further Notice are designed to allow U.S. carriers to negotiate individualized operating agreements with ETECSA, the Cuban carrier. Allowing U.S. carriers to negotiate individualized operating agreements may lead to more U.S. carriers entering into operating agreements with ETECSA, more direct connections between the United States and Cuba, and lower settlement rates on the U.S.-Cuba route.

17. The proposals in this Further Notice, if adopted, would not change the need for a U.S. carrier to reach an agreement with the Cuban carrier and to file the agreement with the Commission. Therefore, these rule changes should not have a significant economic impact on any carrier. Further, these requirements are only applicable to facilities-based carriers, which are generally large companies and do not come within the definition of small businesses. Consequently, we do not believe that the proposals affect a substantial number of small businesses. Accordingly, the Commission certifies that the proposed rule change will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Further Notice, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.³⁶ This initial certification will also be published in the Federal Register.³⁷

18. For further information, contact David Krech, Associate Chief, Telecommunications & Analysis Division, International Bureau, at 202 418 7443 or David.Krech@fcc.gov; or Jodi Cooper, Attorney, Telecommunications & Analysis Division, International Bureau, at 202 418 2064 or Jodi.Cooper@fcc.gov.

V. ORDERING CLAUSES

19. IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 4(j), 201-205, 208, 211, 214, 303(r), 309, and 403, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, 208, 211, 214, 303(r), 309, and 403, this Further Notice of Proposed Rulemaking IS ADOPTED.

20. IT IS FUTURE ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes to Commission policy and rules described in this Further Notice of Proposed Rulemaking and that comment is sought on these proposals.

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for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

³⁶ 5 U.S.C. § 605(b).

³⁷ *Id.*

21. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Proposed Rules

Part 63 of the Commission rules is amended as follows:

PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for part 63 continues to read as follows:

Authority: Sections 1, 4(i), 4(j), 10, 11, 201-205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 161, 201-205, 214, 218, 403, and 571, unless otherwise noted.

2. Remove and reserve paragraph (f) of § 63.22 to read as follows:

63.22 Facilities-based international common carriers.

(f) [Removed and Reserved].

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *International Settlements Policy Reform*, IB Docket No. 11-80; *Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon*, RM-11322; *IConnect Wholesale, Inc. d/b/a TeleCuba: Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba*, IB Docket No. 10-95; *Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, IB Docket No. 05-254

This proceeding marks yet another strike against command-and-control regulation, as the Commission explores retiring the international tariffing system—a system that does not fit digital-age communications networks.

But let's be clear: Ending this policy will not give Cuba's people any measure of the freedom we enjoy in the United States. The Castro regime remains in power. It is that regime that suppresses Internet access, censors information, and restricts any medium that could serve as a platform for democracy. It is that regime that arbitrarily arrests and sentences to lengthy prison terms individuals who do nothing more than say what they think.¹ There is no rule the FCC could repeal that would affect Cuba's rulers.

A communications network is a bare cupboard if there is no freedom of expression. A way to say something means little if there is little you are allowed to say. Much more will have to happen before digital liberty finds Cuba's shores.

¹ See, e.g., "Cuba detains dissidents ahead of Pope Francis' visit," Reuters (Sept. 13, 2015) (regime arrested dozens of members of Ladies in White, a group founded by the wives and female relatives of Cuban dissidents jailed after the 2003 Black Spring), available at <http://reut.rs/1Kcrw7R>; "Estados Unidos critica prision para dos opositores en Cuba," *Martí* (Nov. 24, 2015) (regime sentenced Vladimir Morera Bacallao to four and a half years in prison for hanging a sign in front of his house and Jorge Ramirez Calderón to two and a half years for peacefully protesting the sanitary conditions in his community), available at <http://bit.ly/1T8EWmK>; see also Press Statement, U.S. Department of State, "Cubans Sentenced for Peaceful Protest," (Nov. 24, 2015) ("Respect for human rights is a cornerstone of our foreign policy, and we call on the Cuban Government to respect its citizens' rights to free expression and peaceful protest."), available at <http://1.usa.gov/1QshXhE>.

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: International Settlements Policy Reform, IB Docket No. 11-80; Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon, RM-11322; IConnect Wholesale, Inc. d/b/a TeleCuba, Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba, IB Docket No. 10-95; Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct, IB Docket No. 05-254

On the surface, this item appears straightforward but it is really a complex intersection of technology, trade and international relations policies. As a strong proponent of removing barriers to free trade and a faithful believer in the power of communications to improve worldwide conditions, I can see one vision of what might occur someday in Cuba. At the same time, eliminating the nondiscrimination requirement risks opening the door to a corrupt, totalitarian regime to extract funding that may further its morally-bankrupt, communist activities. In the end, I can only concur with this proceeding.

Generally, U.S. trade policy over the last few decades has sought to increase overall trade by reducing or removing barriers, even with countries that don't come near to sharing America's values, freedoms or economic beliefs. A sound justification for this is that greater economic ties and interactions are in our national interest and can provide the impetus for political and economic changes, including free market and democratic tendencies, to take hold in those countries. The extent that this approach can work in Cuba is unclear, given the longstanding desire of its despot leaders to suppress progress and the wellbeing of its people.

Along the same lines, expanding communications capabilities between the U.S. and other countries may have similar effects. It's one reason that certain nations around the world try to limit the availability of communications technologies, whether through making international phone calls prohibitively expensive or restricting access to the Internet¹ and the free flow of information. It's also why certain foreign governments try to control journalism and the media. Both of these conditions exist today in Cuba.

The good news is that one of the realities of the Internet is that it was originally designed to counteract the efforts of any one entity from curtailing its operations, thereby decreasing the ability to censor users' activity. Try as these countries may to prevent access to certain information, people and technology will eventually find a way. Although this is ultimately a losing battle, some governments have repeatedly advocated for the international regulation of the Internet as a means to place additional hurdles in the way of an informed citizenry. Such efforts must be swiftly and soundly defeated. As such, selling communications equipment, allowing greater communications between U.S. citizens and residents in Cuba, and expanding the amount of information available could be beneficial to the Cuban people and others living under oppressive regimes, to the extent that they ever get to use it.

In terms of the particulars of this item, proposing the elimination of the nondiscrimination requirement applicable to voice communications is an extremely questionable move, even at this Further Notice of Proposed Rulemaking stage. Except for political moves by this Administration, I am at a loss to see any "changed circumstances"² that would warrant relaxing our 2011 *TeleCuba Waiver Order*,³ to the extent that was even a sound decision.

¹ My use of the Internet in this document as an example of a communications technology does not mean to suggest that I believe that it is a telecommunications service.

² See Further Notice of Proposed Rulemaking, *supra* ¶ 6.

The *TeleCuba Waiver Order* specifically imposed nondiscrimination requirements in exchange for the right to charge significantly above the benchmark rate.⁴ During consideration of the 2011 item, the record indicates that Cuba demanded higher benchmark rates than were permitted and necessary to provide service.⁵ In fact, the Commission was told, at the time, by TeleCuba that the Cuban Ministry of Communications and Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), the nationalized carrier, consistently sought a rate of \$0.84 per minute,⁶ which far exceeded that of any neighboring country.⁷ The only reason to seek such a rate would have been to fund some other activity in Cuba since it was not about the cost of operations or a sensible profit.⁸

To help prevent abuses of the higher-than-necessary rate, the Commission authorized a *temporary, limited waiver* of its benchmark policy while retaining the nondiscrimination requirement of the international settlements policy (ISP),⁹ which has since been mostly eliminated,¹⁰ and adopting additional nondiscrimination conditions applicable to the waiver circumstances.¹¹ This position was consistent with *this* Administration's State Department Cuba policy,¹² as well as supported by communications providers seeking to directly serve the Cuban people.¹³

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³ *IConnect Wholesale, Inc., d/b/a TeleCuba; Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba*, IB Docket No. 10-95, Memorandum Opinion and Order, 26 FCC Rcd 5217 (2011) ("*TeleCuba Waiver Order*").

⁴ *Id.* at 5228 ¶ 31.

⁵ *Id.* at 5221, 5224 ¶¶ 11, 19 (stating that the applicable benchmark termination rate for direct service to Cuba is \$0.19 per minute).

⁶ *Id.* at 5225 ¶ 21.

⁷ *Id.* at 5226 ¶ 25.

⁸ I note that two other benchmark waivers have been granted since the *TeleCuba Waiver Order*. The rates are not publicly available, but they clearly exceed the \$0.19 per minute benchmark rate. See Letter from Maria Cattafesta, Senior Counsel, Government Affairs, Sprint Communications Company, L.P., to Mindel De La Torre, Chief, International Bureau, Federal Communications Commission, IB Docket No. 10-95 (Aug. 7, 2015); Letter from Douglas W. Everette, Counsel, IDT Domestic Telecom, Inc., to Mindel De La Torre, Chief, International Bureau, Federal Communications Commission, IB Docket No. 10-95 (Feb. 12, 2015).

⁹ *TeleCuba Waiver Order*, 26 FCC Rcd at 5224, 5228 ¶¶ 18, 30-31.

¹⁰ *International Settlements Policy Reform Joint Petition for the Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct Petition of AT&T for Settlements Stop Payment Order on the U.S.-Tonga Route*, IB Docket Nos. 11-80, 05-254, 09-10, Report and Order, 27 FCC Rcd 15521 (2012) ("*ISP Order*"). In fact, the only provision of the ISP currently in effect is the nondiscrimination policy on the U.S.-Cuba route. See *id.* at 15530-32, ¶¶ 17-20; see also Further Notice of Proposed Rulemaking, *supra* ¶ 4.

¹¹ *TeleCuba Waiver Order*, 26 FCC Rcd at 5225-26, 5228 ¶¶ 23, 31.

¹² See Further Notice of Proposed Rulemaking, *supra* ¶ 3 (citing *Modification of Process to Accept Applications for Service to Cuba and Related Matters*, Public Notice, 25 FCC Rcd 436 (IB 2010)); *TeleCuba Waiver Order*, 26 FCC Rcd at 5226 ¶ 23. The State Department, however, practically endorsed this process in the proceeding that resulted in the *ISP Order*. See Letter from Ambassador Philip L. Verveer, U.S. Coordinator for International Communications & Information Policy, U.S. Department of State, to Julius Genachowski, Chairman, Federal Communications Commission, IB Docket No. 11-80 (Oct. 16, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7022037398> ("The Department recommends that the FCC continue to apply at least some aspects of the ISP to ensure that Cuba does not disfavor or discriminate against some U.S. carriers with regard to the accounting rate for terminating traffic on the U.S.-Cuba route. The Department, therefore, supports continued application of the nondiscrimination requirement.... In addition, the Department

(continued....)

The Cuban Democracy Act of 1992,¹⁴ which has not been repealed by Congress, contains two important components that appear to be applicable but seem to have been forgotten. First, section 1705(e)(4) states that “[n]othing in this subsection shall be construed to supersede the authority of the Federal Communications Commission.”¹⁵ This savings clause means that the Commission is not beholden to the Administration for implementation of the Act, and we retain our authority to execute policy in this area as we see necessary, including preventing outrageous international rate gouging for ulterior purposes. Second, section 1710(a) requires the Secretary of the Treasury to “take the necessary steps to ensure that activities permitted under section 1705 are carried out for the purposes set forth in this title and not for purposes of the accumulation by the Cuban Government of excessive amounts of United States currency or the accumulation of excessive profits by any person or entity.”¹⁶ This language highlights that Congress specifically did not want Cuba to extract higher telecommunications rates for its own gain. How does allowing, by waiver, exceedingly higher rates than the benchmark rates combined with the right to freely discriminate against any U.S. provider not lead us to a place where the Cuban Government could accumulate excessive profits?

Current policy was designed, in part, to keep U.S. telecommunications ratepayers from being used as piggy banks to fund the unscrupulous agendas of corrupt regimes. In essence, the Cuban Government sought to extract extra payments from U.S. residents who were able to escape communism and now seek to talk to those relatives or friends still stuck in Cuba. Although the benchmark settlement rate will remain, we are starting a process by which Cuba may be able to collect even more money from the right to enact discriminatory practices against some U.S. providers.

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supports the current policy of continuing the application of the benchmark rate to the U.S.-Cuba route as well as the waiver process available for the application of the benchmark rate to that route.”).

¹³ *Id.* at 5221-22, 5223, 5225 ¶¶ 13-14, 17, 22.

¹⁴ Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified at 22 U.S.C. § 6001 *et seq.*).

¹⁵ 22 U.S.C. § 6004(e)(4).

¹⁶ *Id.* § 6009(a).